

BEFORE THE HYDRAULICS APPEALS BOARD
STATE OF WASHINGTON

JEAN ARNOLD,

Appellant,

v.

STATE OF WASHINGTON DEPARTMENT
OF FISHERIES,

Respondent.

HAB No. 89-1

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

This matter came on for hearing before the Hydraulics Appeals Board, William A. Harrison, Administrative Appeals Judge, presiding, and Board Members Hedia R. Adelsman, Stuart A. Trefry and Kahler Martinson.

The matter is an appeal from the Department of Fisheries' denial of a hydraulic project approval.

Appellant Ms. Jean Arnold appeared and represented herself. Department of Fisheries appeared by Fronda Woods, Assistant Attorney General.

1 The hearing was conducted on October 26, 1989, in Lacey.
2 Reporter Gene Barker and Associates recorded the proceedings.

3 Witnesses were sworn and testified. Exhibits were examined.
4 From testimony heard and exhibits examined the Hydraulics Appeals
5 Board makes these:

6 FINDINGS OF FACT

7 I

8 This matter arises on the South Fork of the Newaukum River in
9 Lewis County. That fork of the River flows over level farm land and
10 provides good habitat for fall and spring Chinook, Coho, steelhead and
11 Cutthroat trout. That fork is also noted for its meandering course
12 which shifts from time to time by natural causes. The shifting course
13 of the River causes bank erosion that is of concern to owners of
14 adjacent farmland.

15 II

16 The Arnold farm, a crop and dairy operation, is adjacent to the
17 River. In 1970, the River channel was relatively straight and close
18 to the property boundary of the farm. However, the acre or two of the
19 farm nearest the River in 1970 was river bottom land, lower in
20 elevation than the farm's crop lands. By 1974, the River meandered
21 over the bottom lands into an ox-bow channel, closer to the crop lands.

22 III

23 In 1976, Mr. William E. Arnold applied to the Department of
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1 Fisheries for hydraulic project approval. The approval authorized
2 gravel removal. As carried out, the gravel was removed in such a way
3 as to create a straight channel for the River back at, or near, its
4 1970 location. However, the River, by 1984, moved naturally back
5 across the bottom land to roughly its 1974 ox-bow location.

6 IV

7 In 1986, a flood on the River caused the ox-bow channel to shift
8 farther onto the Arnold property. This was a 25 year-duration flood.
9 The channel has remained there to this time, causing bank erosion into
10 crop land.

11 V

12 On February 17, 1987, appellant Ms. Jean Arnold, applied to the
13 Department of Fisheries for hydraulic project approval. Her proposal
14 was to make a new, straighter river channel short-cutting the ox-bow.
15 Its location would be like that made earlier, in 1976. The proposal
16 was accompanied by a rough sketch. It lacked complete plans and
17 specifications.

18 VI

19 The application was referred to the Lewis County Streambank
20 Stabilization Committee. This Committee has a representative from
21 each public agency with jurisdiction over bank stabilization. These
22 include Fisheries, Wildlife, and Ecology from state government, the
23 Soil Conservation Service from the federal government, and the Lewis
24

1 County Planning Department. The Committee recommended against the
2 proposed new channel as unsound "engineering - wise or biologically
3 (due to habitat loss)."

4 VII

5 By letter of June 16, 1987, the Department of Fisheries denied
6 Jean Arnold's application for the proposed new channel. The reasons
7 stated for the denial were:

- 8 1. Loss of fish life and habitat in the channel that
9 would be abandoned.
- 10 2. Loss of stream length estimated to be upwards of 900
11 feet.
- 12 3. Increased rate of erosion and subsequent streambed
13 sedimentation in the stream reach as any shortened
14 new channel would, in a short time, be expected to
15 lengthen by lateral meandering both upstream,
16 downstream, and in the new channel. Stream dynamic
principles well support the fact that a stream
dissipates its energy by forming meanders and attains
a certain length dependent upon land gradient, soils,
and flow regime.

16 The letter went on to indicate:

17 "We would consider direct protection of selected bank
18 areas should you desire to submit detailed plans with the
19 Hydraulics Project Application that was left with you."

20 The letter did not contain information on the planning or financing
21 programs of the Soil Conservation Service which might be pertinent to
22 the direct protection of selected banks suggested by Fisheries.

23 VIII

24 Direct protection of selected banks would probably suspend
25 erosion of the Arnold farm, if properly planned.

26 FINAL FINDINGS OF FACT,
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IX

Following denial, Ms. Arnold did not file an application for bank protection. There followed further correspondence, requests and denials along the same lines as previously. From these, Ms. Arnold filed an appeal before this Board.

X

The present ox-bow channel of the River is approximately 945 feet in length. Fisheries has investigated it, and found 8 nests of spring Chinook in that reach on the date of investigation. The reach contains riffles and pools. It is protected by overhanging trees in several places. By contrast, the short-cut channel being proposed would be some 475 feet long. It would have a steeper gradient and thus contain few or no pools. Pools are useful as fish rearing areas. The new channel would be 470 feet shorter, thus resulting in that net loss of habitat. In addition, fish loss would occur directly were the ox-bow channel de-watered to shift flow to the proposed short-cut channel. Finally, shortening of the River's course is likely to result in increased meandering downstream as the River re-establishes its equilibrium. Erosion would result from this natural readjustment of the River in response to the new channel.

XI

About 4 miles upstream from the Arnold farm, a similar ox-bow short-cut was carried out by another landowner. While that action

1 occurred without hydraulics permit approval, the impacts to fish life
2 were similar to those predicted for this proposal.

3 XII

4 The evidence does not disclose whether Fisheries or other
5 agencies have a bank protection demonstration project on the South
6 Fork of the Newaukum River. Such a project might be beneficial in
7 showing how erosion may be controlled on a meandering river without
8 the construction of new channels.

9 XIII

10 Any Conclusion of Law which is deemed a Finding of Fact is hereby
11 adopted as such. From these Findings of Fact, the Board makes these

12 CONCLUSIONS OF LAW

13 I

14 Because Ms. Arnold proposes to change the natural flow of the
15 South Fork Newaukum River, RCW 75.20.103 requires that she seek to
16 protect fish life by securing approval from Fisheries before
17 commencing work:

18 In the event that any person . . . desires to construct
19 any form of hydraulic project or other work . . . when
20 such hydraulic project or other work is associated with
21 streambank stabilization to protect farm and agricultural
22 land as defined in RCW 84.32.020, and when such . . .
23 streambank stabilization will use, divert, obstruct, or
24 change the natural flow or bed of any river or stream
25 . . . , the person shall, before commencing construction
26 or work thereon and to ensure the proper protection of
27 fish life, secure a written approval from the department
of fisheries . . . as to the adequacy of the means
proposed for the protection of fish life. . . .

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II

Also under RCW 75.20.103:

A complete application for an approval shall contain general plans for the overall project, complete plans and specifications of the proposed construction or work within ordinary high water line, and complete plans and specifications for the proper protection of fish life.

III

Fisheries has adopted an administrative rule implementing chapter 75.20 RCW which gives guidance on how to protect fish life:

The following technical provisions may apply to channel change--Temporary and permanent projects:

(1) Permanent new channel shall be similar in length, width, depth, gradient, and meander configuration as the old channel.

(2) The new channel shall provide fish habitat similar to that which previously existed in the old channel.

WAC 220-110-080.

IV

Lastly, Fisheries has the burden of showing that its denial of hydraulic project approval is solely aimed at the protection of fish life. RCW 75.20.103.

V

Fisheries has proven that the proposed hydraulic project involves a channel change which would adversely affect fish life in violation of RCW 75.20.103. The proposal should be denied.

VI

Moreover, the hydraulic project application was inconsistent with

1 RCW 75.20.103 with regard to plans and specifications. The proposal
2 for a new channel is too vague to assure that the River would not
3 depart the new channel soon after entering it. The cost of a stable
4 new channel adversely affecting fish life does not appear less than
5 the cost to protect the existing bank without adverse effect to fish
6 life.

7 VII

8 There is evidence in this case that appellant eventually learned
9 of and rejected the technical or financial assistance of the U.S. Soil
10 Conservation Service (SCS). We conclude, however, that the initial
11 Fisheries' letter of denial (Exhibit R-4 on this record) should have
12 contained a reference to the SCS, its local address and a brief
13 statement about assistance that may be available from SCS, so as to
14 put that information before the applicant at the outset.

15 VIII

16 Any Finding of Fact which is deemed a Conclusion of Law is hereby
17 adopted as such. From these Conclusions of Law the Board enters this
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ORDER


The Department of Fisheries' denial of hydraulic project approval to Ms. Jean Arnold is, hereby, affirmed.


DONE at Lacey, WA, this 20th day of November, 1989.

HYDRAULICS APPEALS BOARD


HERTA R. ADELSMAN, Member


STUART A. TREFRY, Member


KAHLER MARTINSON, Member


WILLIAM A. HARRISON
Administrative Appeals Judge

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